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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~133~~ ~~134~~ 4 and 5

MAJOR RAYMOND LISENBA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITION FOR REHEARING.

MORRIS LAVINE,
Counsel for Petitioner.

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A. Where constitutional questions are involved in the conviction and death sentence of a man a rehearing ought to be granted so that the case may be decided by a majority of the Court. No death penalty should be imposed through what is really a lack of decision by the highest court of the nation 1

B. The points of law raised in this case are of great importance in establishing the law of the case throughout the United States relative thereto, and ought to be decided by a majority of the Court. Certain matters were overlooked in the presentation of the case originally and in oral argument which this Honorable Court should consider before this case is finally and definitely determined 2

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I. The 14th Amendment proscribes use in evidence of a confession obtained following the third degree. Here the petitioner was seized by the District Attorney's men and taken to the torture house next door. There followed the unauthorized acts by the District Attorney and his investigators, the beatings, tortures, deprivation of food, sleep, counsel, the removal to and retention of petitioner in the "High Power" tank of the jail, undenied threats by the District Attorney, questionings and cross-questioning into

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

PETITION FOR REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Your petitioner, Major Raymond Lisenba, most respectfully petitions for a rehearing in the decision of this Honorable Court rendered on April 7th, 1941, by an equally divided Court, as I bases this petition upon the following grounds, to-wit:

A.

WHERE CONSTITUTIONAL QUESTIONS ARE INVOLVED IN THE CONVICTION AND DEATH SENTENCE OF A MAN A REHEARING OUGHT TO BE GRANTED SO THAT THE CASE MAY BE DECIDED BY A MAJORITY OF THE COURT. NO DEATH PENALTY SHOULD

1/

BE IMPOSED THROUGH WHAT IS REALLY A LACK OF DECISION BY THE HIGHEST COURT OF THE NATION.

B.

THE POINTS OF LAW RAISED IN THIS CASE ARE OF GREAT IMPORTANCE IN ESTABLISHING THE LAW OF THE CASE THROUGHOUT THE UNITED STATES RELATIVE THERETO, AND OUGHT TO BE DECIDED BY A MAJORITY OF THE COURT. CERTAIN MATTERS WERE OVERLOOKED IN THE PRESENTATION OF THE CASE ORIGINALLY AND IN ORAL ARGUMENT WHICH THIS HONORABLE COURT SHOULD CONSIDER BEFORE THIS CASE IS FINALLY AND DEFINITELY DETERMINED.

I.

THE 14TH AMENDMENT PROSCRIBES USE IN EVIDENCE OF A CONFESSION OBTAINED FOLLOWING THE THIRD DEGREE. HERE THE PETITIONER WAS SEIZED BY THE DISTRICT ATTORNEY'S MEN AND TAKEN TO THE TORTURE HOUSE NEXT DOOR. THERE FOLLOWED THE UNAUTHORIZED ACTS BY THE DISTRICT ATTORNEY AND HIS INVESTIGATORS, THE BEATINGS, TORTURES, DEPRIVATION OF FOOD, SLEEP, COUNSEL, THE REMOVAL TO AND RETENTION OF PETITIONER IN THE "HIGH POWER" TANK OF THE JAIL, UNDENIED THREATS BY THE DISTRICT ATTORNEY, QUESTIONING AND CROSS-QUESTIONING INTO THE EARLY HOURS OF THE MORNING UNTIL A PURPORTED CONFESSION WAS OBTAINED AND THEREAFTER USED IN EVIDENCE AGAINST PETITIONER. THE 14TH AMENDMENT APPLIES TO AND OPERATES EQUALLY UPON WHITE MEN AS WELL AS NEGROES.

II.

THE USE OF TWO LIVE, WRITHING AND HORRIFYING RATTLESNAKES AND A DEAD SNAKE WITH MOUTH AND JAWS OPEN, WAS SOLELY TO BRING ABOUT A VERDICT THROUGH PASSION AND PREJUDICE AND WAS SO INFLAMMATORY IN ITS NATURE AS TO DEPRIVE PETITIONER OF A FAIR AND IMPARTIAL TRIAL GUARANTEED BY

THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. THE SNAKES—CALLED "LIGHTNING" AND "LETHAL" PROVED NOTHING—BUT DID HAVE A LIGHTNING EFFECT ON THE JURY AND LETHAL EFFECT ON THE DEFENDANT. A TRIAL BASED ON PASSION AND PREJUDICE DEPRIVES THE ACCUSED OF RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

THE USE IN CALIFORNIA OF EVIDENCE BROUGHT FROM THE STATE OF COLORADO BY THE AGENTS OF THE STATE OF CALIFORNIA, WITHOUT ANY NOTICE OR OPPORTUNITY TO DEFEND DEPRIVED THE PETITIONER OF THE FUNDAMENTALS OF DUE PROCESS OF LAW. THE INDICTMENT DID NOT CONTAIN THE NAMES OF THE COLORADO WITNESSES IN ADVANCE NOR WAS PETITIONER NOTIFIED UNTIL THE TRIAL WAS IN PROGRESS. A REQUESTED CONTINUANCE WAS DENIED.

IV.

CALIFORNIA'S PRINCIPAL WITNESS WAS ONE CHARLES H. HOPE, WHO SINCE THE TRIAL STATED HE WAS PROMISED IMMUNITY TO TESTIFY FALSELY AND THAT HE DID TESTIFY FALSELY IN THE TRIAL AT THE REQUEST OF THE PROSECUTION WHO KNEW HIS TESTIMONY WAS "ALL THE BUNK." THE USE OF TESTIMONY KNOWN TO BE PERJURED VIOLATES DUE PROCESS OF LAW GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V.

THE PETITIONER WAS DENIED THE RIGHT OF COUNSEL, AND THEREFORE DUE PROCESS OF LAW GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

VI.

EACH OF THE ACTIONS OF THE STATE, VIOLATIVE OF THE FUNDAMENTAL RIGHTS OF THE PETITIONER, DENIED TO HIM THE

EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A.

WHERE CONSTITUTIONAL QUESTIONS ARE INVOLVED IN THE CONVICTION AND DEATH SENTENCE OF A MAN A REHEARING OUGHT TO BE GRANTED SO THAT THE CASE MAY BE DECIDED BY A MAJORITY OF THE COURT. NO DEATH PENALTY SHOULD BE IMPOSED THROUGH WHAT IS REALLY A LACK OF DECISION BY THE HIGHEST COURT OF THE NATION.

The petitioner, Major Raymond Lisenba, is sentenced to death. This sentence stands because four Justices of this Honorable Court disagree with four other Justices of this Court. The result is that the judgment has been affirmed by what virtually amounts to a lack of decision, and therefore solely by operation of law. No man should go to his death on a lack of decision by the highest court in the land. No death penalty has heretofore stood affirmed through lack of decision.

Under the Constitution and laws of the State of California, if a single juror of the twelve jurors required to pass upon the verdict disagrees with the other eleven, *a new trial* is mandatory. The Court is powerless to carry into execution any judgment unless all twelve jurors agree.

Article I, Section 7, Constitution of California.

People v. *Garcia*, 98 Cal. App. 702, 277 Pac. 747.

If all twelve jurors agree on a guilty verdict they must still agree on the penalty to be imposed, and if a single juror disagrees with the other eleven on the imposition of the death penalty, such disagreement requires a new trial, even though all the jurors agree that the defendant is guilty and disagree only as to the penalty—as between the death penalty and life imprisonment.

If all twelve jurors *agree on the death penalty*,—still the trial judge in the case may set aside the verdict and grant a new trial. (Section 1181, Penal Code of California.) Such right and power is discretionary and the laws of California require it to be exercised in case the verdict has been reached by any means other than a fair expression of opinion on the part of all of the jurors. A single judge is required to grant a new trial if there has been an unfair trial in any respect whatsoever. (Section 1181, Penal Code of California.)

People v. *Duvernay*, 2 Cal. Dec. 236;
People v. *Gilliland*, 39 Cal. App. (2d) 252, 264;
Mooney v. *Holohan*, 294 U. S. 103;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

Yet where four Honorable Justices of this high court—selected as the finest legal minds in this country—disagree with four other members of this high court as to whether the petitioner's constitutional right to a fair trial has been invaded, the result, unless a rehearing is granted, would be of far less effect than if a single juror disagreed on the question of innocence or guilt or on the question of penalty to be imposed, or if a single judge disagreed with the jury while sitting in the trial of the case.

Surely in this great land of ours under the American way of life the effect of the views of four members of this Honorable Court cannot be and should not be given so little weight in comparison with that given to the views of a single juror or a single trial judge, and we most respectfully pray that all members of this Honorable Court join in voting for a rehearing so that the issues heretofore presented on this appeal may be decisively determined by a majority opinion of the highest court in the United States.

The history of this Court has been that where decisions on constitutional questions are involved the case will not be decided finally unless there is a concurrence of a majority of all the Justices.

In the case of *George Briscoe* v. *Comm. Bank of the State of Kentucky*, et al, 8 L. Ed. 887, 888, Mr. Chief Justice Marshall delivered the opinion of the Court in this and another case. Both cases were continued until the next term of the Court. The Chief Justice stated:

> "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore directs these cases to be re-argued at the next term, under the expectation that a larger number of the judges may then be present."

At that time the Court consisted of six members and it required four to have a majority of the Court.

In the famous case of *Dred Scott* v. *Sanford*, 15 L. Ed. 691 at 698, Mr. Chief Justice Taney, pointing out that there were differences in the opinion of the Court as to questions that were considered of high importance, it was deemed advisable to continue the case and direct a re-argument in order that the Court might have an opportunity to give to the whole subject a more deliberate consideration. The case was then ultimately decided by a four to two Court.

In the cases of *The Mayor of New York* v. *George Miln, et al.—George Briscoe* v. *Comm. Bank of Ky.*, 9 L. Ed. 60, the Court, on writ of error stated, through Mr. Chief Justice Marshall, "The Court cannot know whether there will be a full Court during the term; but as the Court is now composed the constitutional cases will not be taken up."

It appeared that the Court at the time of this motion and during the whole term was composed of six justices, the vacancy occasioned by the resignation of Mr. Justice Duval not having been filled. The case was later decided at the following term of the Court.

In the case of *George Briscoe* v. *Comm. Bank of Ky.*, 9. L. Ed. 709, the Court refused to take up considerations involving constitutional questions when the Court was not full. (9 L.-Ed. 60.) This would indicate a belief that it was the intention of the framers of the Constitution that constitutional questions should be heard and determined by a full Court and judgment should be rendered—not by operation of law—but by a decision or judgment of the Court. Further, it was intended that such questions be heard and determined by a *full* Court and that litigants have that right.

The legal tender cases of *Knox* v. *Lee* and *Parker* v. *Davis* were first argued before the Supreme Court on November 17, 1869, re-argued February 23, 1871, and further on April 18th and 19th, 1871, until decided by a majority of the Court.

In the comparatively recent case of *RR. Commission of California* v. *Pacific Gas and Electric Company*, June 1, 1937, in a per curiam opinion the Court affirmed a decree of the Northern District of California by an equally divided Court. Mr. Justice Southerland took no part in the consideration of that case. (October Term, 1936; 81 L. Ed. 1933, 1934.) A rehearing was granted and the case was restored to the docket for reargument October 13, 1937, and a decision was finally rendered by this Honorable Court on January 3, 1938. (302 U. S. 389, 391; 82 L. Ed. 319, 321.)

Petitioner most respectfully prays therefore that this Honorable Court grant a rehearing in the case so that a majority of this Court may decide the issues herein involved and that a man's life may not be forfeited where

four of the Justices of the highest Court in the land are of the opinion that his constitutional rights have been invaded and where less effect would be given to their views than where a single juror or a single trial judge might hold the same views.

B.

THE POINTS OF LAW RAISED IN THIS CASE ARE OF GREAT IMPORTANCE IN ESTABLISHING THE LAW OF THE CASE THROUGHOUT THE UNITED STATES RELATIVE THERETO, AND OUGHT TO BE DECIDED BY A MAJORITY OF THE COURT. CERTAIN MATTERS WERE OVERLOOKED IN THE PRESENTATION OF THE CASE ORIGINALLY AND IN ORAL ARGUMENT WHICH THIS HONORABLE COURT SHOULD CONSIDER BEFORE THIS CASE IS FINALLY AND DEFINITELY DETERMINED.

In Seeking a rehearing in this Court, we desire an opportunity to present many facts and clarify several matters which petitioner was unable to present at the oral argument, due to the fact that although five points were raised and the record comprises 1140 pages on the appeal from the judgment, only one hour was taken to present the case. It resulted that certain factual matters which were misstated by the respondent, the People of the State of California, were not corrected, and certain matters remained unclarified, and certain other matters could not even be reached for discussion.

ARGUMENT.

I.

THE 14TH AMENDMENT PROSCRIBES USE IN EVIDENCE OF A CONFESSION OBTAINED FOLLOWING THE THIRD DEGREE. HERE THE PETITIONER WAS SEIZED BY THE DISTRICT ATTORNEY'S MEN AND TAKEN TO THE TORTURE HOUSE NEXT DOOR.

THERE FOLLOWED THE UNAUTHORIZED ACTS BY THE DISTRICT ATTORNEY AND HIS INVESTIGATORS, THE BEATINGS, TORTURES, DEPRIVATION OF FOOD, SLEEP, COUNSEL, THE REMOVAL TO AND RETENTION OF PETITIONER IN THE "HIGH POWER" TANK OF THE JAIL, UNDENIED THREATS BY THE DISTRICT ATTORNEY, QUESTIONINGS AND CROSS-QUESTIONING INTO THE EARLY HOURS OF THE MORNING UNTIL A PURPORTED CONFESSION WAS OBTAINED AND THEREAFTER USED IN EVIDENCE AGAINST PETITIONER. THE 14TH AMENDMENT APPLIES TO AND OPERATES EQUALLY UPON WHITE MEN AS WELL AS NEGROES.

For instance—in reference to the argument on the third degree administered to this petitioner by the agents of the State of California, the facts show that the petitioner was taken into custody by the district attorney's investigators (R. 484), supervised by an assistant district attorney, and was taken to the district attorney's office in the same building in which the county jail is located; then he was returned to a private house next door where he was kept incommunicado two days and nights—admittedly 48 hours—and more likely 60 hours (R. 492, 493)—district attorney's investigator Littleton said 60 hours (R. 824).

Mr. Justice Frankfurter, during the oral argument, asked if the district attorney had authority to make an arrest in California, and the deputy district attorney presenting the matter for the State of California replied that the district attorney had such authority, but said he could not point to the particular code section giving that authority.

Section 817 of the California Penal Code defines who are peace officers having the right to make arrests. This section states:

> "Peace Officer Defined. A peace officer is a sheriff of a county, marshal of a municipal court, a constable of a township, marshal, policeman of a city or town, in-

spector of the California State Board of Pharmacy not exceeding ten in number, special agents and assistant special agents of the Board of Medical Examiners of the State of California, (an inspector of the Board of Osteopathic Examiners of the State of California, an inspector of the Board of Chiropractic Examiners of the State of California,) the superintendent and the special criminal investigators of the Bureau of Criminal Identification and Investigation, and the Chief and inspectors of the Division of Narcotic Enforcement."

It thus is apparent that the *district attorney* had no authority, and has no authority, to make arrests. His sole duty as our district attorney, generally, is that of a prosecuting officer, presenting cases in court for the people. The taking of James to a private house under the circumstances was an act of kidnaping. (Section 207 of the California Penal Code.) (*People* v. *Ogden*, 103 Cal. App. Dec. 442, 107 P. (2d) 50.) It was in any event a lawless act radically inconsistent with our free constitutional American Government, designed to give every citizen the right of an opportunity to prepare his defense, to present it in a court, free of passion or prejudice, and to preserve inviolate the liberty of each individual until he has been lodged in a public jail on a charge legally made.

Instead, the course here pursued is similar to the methods of dictator countries, the rack, the torture chamber, the thumbscrew, and other means of extorting from the innocent a confession to suit the whims and wishes of a prosecutor.

It was conceded by counsel for the respondent that the petitioner did not sleep for twenty-four hours, but the record shows, from the testimony of Scott Littleton, that the petitioner did not sleep at any time during the forty-eight hours (R. 783) that it was admitted he was held in the private house, and, according to a magazine article written by Scott Littleton, it was at least sixty hours that

he did not sleep and was subjected to this torture. The magazine article referred to is set forth on pages 824 to 826 of the record, and in part reads as follows:

(Page 20 of Liberty Magazine of July 25, 1936.)

> **"Meanwhile we went around and around with him about the death of his wife. For nearly sixty hours we kept him awake, taking turns questioning him."**

The following acts of third degree were shown by the record to have occurred in the *horror chamber* which the respondent called "the house next door."

1. James was kept incommunicado for a period of from forty-eight to sixty hours;

2. He was shown a dictograph for its psychological effect;

3. He was admittedly struck by Officer J. C. Southard, in charge of the investigation;

4. He received a hernia;

5. He was made black and blue from the waist up;

6. He was made hard of hearing by being beaten about the ears;

7. He was incessantly questioned;

8. Officers questioned him in relays, two of them taking turns while two others slept in comfortable beds nearby;

9. At no time was he permitted to sleep during at least the first forty-three hours, and finally he fell over in his chair from sheer exhaustion, and slept for a period of from three to five hours (R. 782, 783);

10. He fainted from exhaustion;

11. The district attorney personally, and his special deputy and others took turns in questioning him at the

district attorney's office when they thought the time was ripe for him to make a statement;

No Arraignment as Required by Law.

12. He was not arraigned before the nearest and most accessible magistrate, as required by law;

13. He was not charged with or arraigned for the murder of his wife for seventeen days after his being taken into custody;

Confined in "High Power" Tank.

14. When finally taken to jail he was placed in a "High Power" tank and kept there during the entire period of incarceration in which this inquisition occurred—after he had left the horror house next door;

The "Third Degreed" Implied Confession From Silence.

15. On May 2, 1936, he was taken from the high power tank to the Chaplain's office in the jail (R. 620); he was without friends or counsel at the time (R. 621). The assistant chief deputy district attorney who had been constantly interrogating him in the horror house, now made a statement to him that the co-defendant had said he, James, had killed his wife (R. 630). A stenographer was present taking down what was purportedly said (R. 630). The stenographer was a deputy sheriff. At the conclusion of the statement by the assistant chief deputy district attorney the defendant was asked if he had anything to add. He replied, "Nothing" (R. 631). This statement that he had "nothing to add" was, over objections (R. 627) that it was not free and voluntary, placed in evidence against him as an admission by silence of guilt (R. 627, 631);

No Food. Then the Psychological Third Degree.

16. He was taken from the jail without his consent and *without being given any food* (R. 670) and brought to the

scene of the fish pond in the back of his home, where his wife had been found dead, at which time he had been so stunned and overcome with grief that the experience required calling a doctor who administered first aid to him (R. 42) and was subjected to the shock of viewing the tragic place. The chief deputy district attorney was there and a large number of newspaper men and investigators (R. 670). The purpose of this trip was obviously a psychological third degree. After keeping him at this scene for some time he was returned to the district attorney's office (R. 673). An intense, persistent and determined interrogation continued (R. 675). "There was questioning for several hours" (R. 675);

At Midnight He Begged "Give Me Something to Eat."

17. He was given no food (R. 670);

18. Shortly before midnight he said he was hungry and asked the officers to take him out and buy him something to eat (R. 633, 588);

No Denial That the District Attorney Threatened Him.

19. His testimony that the district attorney had threatened and browbeat him is undisputed and uncontradicted. It was only after he was fed that he made statements which he had been told over and over again to say if he wanted to prevent further torture;

20. It was Saturday afternoon when he was thus removed from the jail and unlawfully tortured and questioned;

21. After being given a meal James says he repeated what "they told me to say"; the story told was fantastic, but what the district attorney wanted (and repeated over and over again) (R. 735);

22. From the very earliest time during the day when he was removed from the jail he had requested that his attor-

ney be sent for, and was told that his attorney was out of the city for the weekend. The inquisition was not delayed until his attorney could be present. He requested that another attorney be sent for, but this was refused. He was thus without friends and advisors (R. 621-624);

The Alleged "Confession" Started at 1:55 A. M., After Undenied Threats, Questioning and Browbeating.

23. The inquisition took place in the early hours of the morning, when one's resistance is known to be lowest (R. 640-641), and after he had been without food all day, had been given a psychological third degree at the scene of the fish pond, and had been repeatedly and incessantly questioned, according to the admissions of the officers themselves, and after he had been browbeaten by the district attorney and accused in the presence of and by his co-defendant who was being extended leniency for his aid to the prosecution;

The Presumption of Fear From Previous Violence, Threats and Mistreatment Not Overcome.

24. James testified he was still suffering from fear of the mistreatment he had received at the horror "house next door," where he was tortured for from forty-eight to sixty hours with beatings and lack of sleep and food. No evidence was produced to overcome the logical and legal presumption that he was not still so suffering from that fear.

The District Attorney Without Authority to Seize Petitioner and Hold Him in Private House.

The violations of due process of law guaranteed by the 14th Amendment to the Constitution of the United States may therefore be grouped as follows:

1. The unlawful and unauthorized seizure of petitioner by the district attorney without warrant or authority of law,

and the holding of him in the horror house next door to his home where admittedly force and violence were used upon him. This misconduct comes under the ban of due process of law as set forth in *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716, *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 672, *Canty* v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988, and *Bram* v. *United States*, 168 U. S. 557, 42 L. Ed. 568.

The misconduct of a prosecutor does not consist merely of unlawful, unauthorized methods in the courtroom, but in his conduct prior thereto which results in the use or production of unlawful or unauthorized evidence.

Mooney v. *Holohan*, 294 U. S. 102, 79 L. Ed. 792;
Chambers v. *Florida*, 309 U. S. 277, 84 L. Ed. 716.

The deprivation of sleep not only in the horror house, where Officer Scott Littleton says he never saw him sleep (R. 782, 783), but also on the day and night when the alleged confession was secured, it having been taken down between 1:30 and 3:00 A. M., when persons are normally in bed, shows the persistent, determined, exhaustive third degree methods used on the petitioner and comes under the ban of *Ziang Sung Wan* v. *U. S.*, 266 U. S. 1.

Use of Silence on Advice of Counsel as Implied Admission of Guilt.

2. It was a violation of petitioner's constitutional rights to take him from the high power tank to an office called the Chaplain's office in the jail, and there, without friends or counsel being present, make a hearsay statement to him that he had been accused by his co-defendant of killing his wife, and upon his failure to "add" anything to the statement made to him by the chief deputy district attorney—use this statement and petitioner's failure to add anything as an implied admission of guilt.

Petitioner had been instructed by counsel not to make any statements unless counsel was present. At that time petitioner was without the benefit of counsel being present, although the district attorney well knew who his counsel was and did not notify or advise counsel. Defendant had already been subjected to cruel third-degree methods; he had been beaten; he had been kicked; he had suffered a hernia; he had been deprived of the right of counsel at the time of his arrest and for many days thereafter; he had been held in an unauthorized manner by the district attorney and questioned for several hours by the chief deputy district attorney in the horror house; he had been held since that time in the "high power" tank; he had been threatened with further mistreatment if he persisted in denying guilt. And he was under no legal duty to speak and his attorney had instructed him not to do so unless the latter was present.

As stated in *People* v. *Pfanschmidt*, 262 Ill. Rep. 449:

> "If the accused says he refuses to answer because he is acting under the advice of counsel, or for any other valid reason, the evidence should not be admitted (Jones on Evidence, 2d ed. sec. 289; People v. Conrow, 93 N. E. Rep. 943; O'Hearn v. State, 25 L. R. A. (N. S.) 542, note; People v. Kessler, 44 Pac. Rep. 97. See also Slattery v. People, 76 Ill. 217.) In discussing the principles underlying this rule, the late Mr. Justice Brown of the United States Supreme Court, said in Brown v. Walker, 161 U. S. 591: 'If an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials, * * * made the system so odious as to give rise to a demand for its total aboli-

tion. * * * So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists, that the States with one accord made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment.' (Bram *v.* United States, 168 U. S. 532.) There is no basis in this record to support an argument that plaintiff in error in any manner acquiesced in the truth of the statements or assertions made in his presence in these various interviews. Would any reasonable man in like circumstances, when he had been advised by his attorney time and again not to talk, be expected to reply to accusations of the kind made in these interviews? Manifestly not."

Fear Once Instilled is Presumed to Continue.

Petitioner desires further to argue and present to this Honorable Court the doctrine that fear once instilled in the mind of an accused is presumed to continue, and the burden is upon the prosecution to overcome this presumption.

This doctrine is set down in the following cases:

People v. *Johnson*, 41 Cal. 452, 455;
State v. *Roberts*, 1 Dev. 259;
Peter v. *State*, 4 Sm. & Marsh. 3;
State v. *Gould*, 5 Halstead 163;
Deatheridge v. *State*, 1 Sneed 75;
2 *Russ on Crime*, 834;
1 *Wharton Am. Cr. Law*, Sec. 694.

This presumption was never overcome.

In *People* v. *Conroy*, 200 N. Y. 356, 93 N. E. 943, the Court again approved the doctrine we have set forth herein.

Also, see *Cota* v. *U. S.*, 25 F. (2d) 299.

If the right to have counsel is sedulously safeguarded under the 14th Amendment to the Constitution of the United States (*Powell* v. *Alabama*, 287 U. S. 45) then the right to follow that counsel's instructions without having it used against one as an implied admission of guilt must necessarily be protected under the 14th Amendment. If one may nevertheless adhere to his constitutional right to remain silent upon the instructions of counsel, and then have that very fact used as an implied admission of guilt, then the constitutional guarantee has been nullified.

We desire further opportunity to present and argue this phase of the case.

The Psychological Third Degree.

3. The third phase of violation of due process of law was the taking of petitioner to the scene of the fish pond, where his wife Mary Emma James was found dead (R. 670-672). It appears that the chief deputy district attorney, Mr. Williams and a large number of newspaper men were present (R. 670).

Mr. and Mrs. Pemberton testified that when James' wife was found dead James suffered great shock (R. 421); that he knelt beside the body; that he was crying all the time (R. 43); that he was terribly upset, he was sick and nauseated (R. 44), and a doctor had to be called to administer aid to him.

Mr. and Mrs. Pemberton (Mrs. Pemberton being Viola Lueck, a close friend of Mrs. James) also testified that James' conduct toward Mrs. James had at all times previous thereto been affectionate and loving (R. 48).

The effect of this proceeding was to induce a confession.

In the case of *Davis* v. *U. S.*, 32 F. (2d) 860, a confession was obtained from an Indian who had been taken to the morgue beforehand to view his deceased wife. The

confession thus obtained was held to be inadmissible. Such procedure is condemned as one of the most vicious forms of third degree. It is a psychological third degree, an attempt to play on the mind and emotions of the accused and to stampede him into submission through anguish and despair.

Early Morning—A Meal for the Hungry Prisoner—Then the "Story".

4. The fourth phase of violation of due process was the repeated and persistent questioning of petitioner in the district attorney's office, without food. When he was first taken out of jail on May 2nd, 1936, he requested that something be bought for him to eat, but the officer with him said there was not time enough for that (R. 670). Later on persons in the district attorney's office all around him ate, while he was not permitted to eat anything, although he saw several others eating sandwiches, but said that he did not get one.

After repeated and persistent questioning and threats by the district attorney (which were never denied by the district attorney) (R., p. 734), at midnight James asked if they would take him out and buy him something to eat on his promise to "tell the story" (R., p. 678)—the early morning purported confession (R., p. 633, 641).

Just as in the cases of *White* v. *Texas*, *Chambers* v. *Florida* and *Canty* v. *Alabama* (*supra*), where all of the "confessions" were taken down in the early hours of the morning, after a constant browbeating and persistent questioning, so here, the purported confession was taken in the early hours of the morning under similar circumstances. In each of the cases cited the petitioner was surrounded by officers who threatened and browbeat him and otherwise mistreated him.

The Purported Confession Promptly Denied on Court Appearance.

The purported confession of James was promptly denied when he appeared in court thereafter (R. 817).

White Man of the West Entitled to Equal Justice the Same as Negro of the South.

It is true that in each of the other cases decided by this Court the petitioner was a negro, and the unusual argument was made in the hearing herein on February 6th, 1941, that this petitioner "was no negro."

We respectfully submit that petitioner is still entitled to the same protection under the laws and Constitution of the United States as are persons of the negro race, and that the 14th Amendment extends to persons in the *West* as well as to those in the *South* and operates alike on all persons similarly situated—whether black, yellow or white.

We desire further opportunity to present and argue these matters and to show that each and all of these things entitle the petitioner in this case to a reversal of the judgment under the 14th Amendment, for, as said in 2 *Haukins. Pleas of the Crown* (8th Ed.) p. 595, Sec. 34:

> "And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

II.

THE USE OF TWO LIVE, WRITHING AND HORRIFYING RATTLESNAKES AND A DEAD SNAKE WITH MOUTH AND JAWS OPEN, WAS SOLELY TO BRING ABOUT A VERDICT THROUGH PASSION AND PREJUDICE AND WAS SO INFLAMMATORY IN ITS NATURE AS TO DEPRIVE PETITIONER OF A FAIR AND IMPARTIAL TRIAL GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. THE SNAKES—CALLED "LIGHTNING" AND "LETHAL" PROVED NOTHING—BUT DID HAVE A LIGHTNING EFFECT ON THE JURY AND LETHAL EFFECT ON THE DEFENDANT. A TRIAL BASED ON PASSION AND PREJUDICE DEPRIVES ACCUSED OF RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The bringing in of the two live rattlesnakes, rattling and writhing, eerie and frightening in their nature, and exhibiting them to the jury was for the sole purpose of inflaming the passions and prejudices of the jury. Their use was for the sole purpose of fomenting a state of irremedial hostility and ineffaceable prejudice in the minds of the jurors against the defendant. They did not have any other use. The people were not satisfied with merely bringing in the snakes and exhibiting them in a box to the jury, but countless pages of testimony in the record and proceedings are devoted to the live snakes brought in (but not in any box similar to the type which it is claimed contained the snakes at James' house), and also to the exhibition of a dead snake brought into the courtroom enclosed in a glass jar, with open mouth and fangs projected from the upper jaw. Rattlesnake venom in crystal form and fangs in the primary, secondary and third growth and the manner in which they were attached to the upper jaw, and the method in which the virus is expelled through the fangs, were exhibited and explained to the jury in much detail. The ways and habits, kinds and species, longevity in captivity, the

manner in which they obtain their food, how and why they coil and strike, and the physical structure of reptiles of the crotalidae family, and the excruciating pain the victim suffers as the subtle poison stealthily creeps through the circulatory system were meticulously discussed by naturalists, zoologists, entomologists and herpetologists, who had earned their degrees at venerable American and European universities. Three or four lay experts who had gained their knowledge of reptile habits from practical experience on the desert and in habitats where snakes are most abundant, added hundreds of pages to the record which could not have assisted the jury in the remotest degree in their consideration of the case.

The snakes were called "Lightning" and "Lethal" by the prosecution. They were lightning in their effect on the jury and lethal on the defendant.

The sole purpose in presenting all these matters was to inflame the passions and prejudices of the jury. They could in no way aid in enabling the jury to arrive at the facts in the case—alleged murder by drowning—and their sole object was to harrow the feelings and excite the passions and prejudices in the minds of the triers of the facts.

Snakes Eerily Sound Rattles.

Uncontroverted affidavits show that the rattlesnakes in the box were sounding their rattles as they were carried down the aisle. The horrifying effect of these exhibits was apparent.

To what extent a case may be tried on the basis of passion and prejudice and to what extent physical evidence, which serves no evidentiary purpose other than to inflame the passions and pejudices of the jury, may be brought into the courtroom, is an issue that we would like to present further to this Honorable Court.

This Court has said, in *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716, that a trial must be free of passion and prejudice. Prejudice is a state of mind founded in passion and not in reason.

In *State* v. *McAfee*, 64 N. C. 339, at p. 340, cited with approval in *Aldrich* v. *U. S.*, 283 U. S. 308, 318, 75 L. Ed. 1057, the Court said:

> "It is essential to the purity of trial by jury that every juror shall be free from bias. If his mind has been poisoned *by prejudice of any kind*, whether resulting from reason or passion, he is unfit to sit on a jury." (Italics added)

In that case the question involved was merely whether one had a right on voir dire to examine jurors as to whether they had any prejudice and should sit on the jury. There, the defendant still had the right to exclude the jurors. But in the case at bar the jurors were already selected and the trial was in progress. How much more important, therefore, to exclude from the courtroom any evidence that would poison, by prejudice of any kind, the mind of a juror already selected and sitting! If a juror whose mind has been poisoned by prejudice of any kind is unfit to sit on a jury, how much more important it is to set aside a verdict where the jury, already sitting, is influenced by prejudicial, inflammatory matter, which poisons his mind.

There are some things of which this Court can take judicial knowledge. One is the native fear in the human being of rattlesnakes. The mere sight of these venomous vipers instills into the heart of the average human being a horror that is hard to erase.

The question was asked in oral argument as to whether the snakes were brought into court in a box similar to that claimed to have been used by the petitioner. They were not brought into court in such a box. A special box was fixed up and brought into court, and it was not a similar

box. There was no demonstration. Nothing was shown to the jurors except the live snakes, writhing and rattling in the box. The snakes had no evidentiary value whatsoever. Yet pages upon pages of the record were devoted to the sinister, slimy, creepy, effect of rattlesnake poison upon a human being, with an Orson Wells effect upon the jury.

This was no trial appealing to reason based on evidence. It was a drama, appealing solely to passion. The deceased died of drowning. Yet, as pointed out in the able dissenting opinion of the late Justice Seawell of California, "What part James took in accomplishing her death by drowning is left to speculation and conjecture." (R. p. 984.)

In *Commonwealth* v. *Carl*, 87 Pa. Sup. Ct. 110, the Court excluded the exhibition of a live dog alleged to be dangerous and vicious, in a trial for harboring a nuisance. The Court there pointed out that it added no evidentiary value to the case.

In the following cases the use of objects not necessary to prove the case was held to be inadmissible:

Dozier v. *State*, 82 Tex. Cr. Rep. 321, 199 S. W. 287;
Lucas v. *State*, 50 Tex. Cr. Rep. 219, 95 S. W. 1055;
Grace v. *State*, 88 Tex. Cr. Rep. 301, 225 S. W. 751;
State v. *Guffy*, 30 S. D. 548, 210 N. W. 980;
Louisville & N. R. Co. v. *Pearson*, 97 Ala. 211, 12 So. 176;
Perry v. *Metro. St. Ry. Co.*, 68 App. Div. 351, 74 N. Y. S. 1;
Newman v. *State*, 85 Tex. Cr. Rep. 556, 213 S. W. 651;
See also, *Sutherland* v. *State*, 24 Ala. App. 573, 139 So. 110.

In *Sutherland* v. *State*, 24 Alabama Appellate Reports, 573, 139 So. 110, the Court said:

> "Waiving for the time being the insistence of appellant's counsel that the coat was not properly identi-

fied as having been worn by defendant at the time of the homicide and the blood as having been that of the dead man, these two articles—the coat with the blood spot and the can of blood—before such objects may be legally admitted in evidence it must be made to appear that they have some tendency to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, to corroborate or disprove some other evidence offered or to be offered. They must have some tendency to shed light upon some material inquiry. It is the duty of the trial court to confine evidence to points in issue in order that the attention of the jury may not be distracted from such matters, by the exhibition of ghastly objects which appeal to the senses and add nothing to the proof. As was said in *L. & N. R. R.* v. *Pearson*, 97 Ala. 211, 12 So. 176, 180, 'Sympathy or indignation, once aroused, in the average juror, readily becomes enlisted to the prejudice of the person accused as the author of the injury.' The coat and the can of blood added nothing to the proof already made and could have had but one effect, and that was to arouse the senses of the jurors against this defendant. The articles should have been excluded. *Boyette* v. *State*, 215 Ala. 472, 110 So. 812; *Crenshaw* v. *State*, 207 Ala. 438, 93 So. 465; *Rollings* v. *State*, 160 Ala. 82, 49 So. 329. In *Hyche* v. *State*, 22 Ala. App. 176, 113 So. 644, and *Patterson* v. *State*, 23 Ala. App. 428, 126 So. 420, the decisions on this point have been limited and clarified so that when the articles offered are relevant and aid in the proof being made they are admissible, but not otherwise."

Demonstrative Evidence Only Admissible When It Demonstrates Something. The Snakes Demonstrated Nothing.

The use of physical objects in evidence is only permissible when it serves to *demonstrate*. It is called "demonstrative" evidence. When, however, it demonstrates nothing, it is inadmissible. Here the snakes demonstrated nothing to the jury and their use as means of inflaming the pas-

sions and prejudices of the jury was violative of the 14th Amendment to the Constitution of the United States.

We desire to show that the use of such evidence violated due process of law as guaranteed by the 14th Amendment, for the use of it was a mere appeal to passion and prejudice and not to reason.

III.

THE USE IN CALIFORNIA OF EVIDENCE BROUGHT FROM THE STATE OF COLORADO BY THE AGENTS OF THE STATE OF CALIFORNIA, WITHOUT ANY NOTICE OR OPPORTUNITY TO DEFEND DEPRIVED THE PETITIONER OF THE FUNDAMENTALS OF DUE PROCESS OF LAW. THE INDICTMENT DID NOT CONTAIN THE NAMES OF THE COLORADO WITNESSES IN ADVANCE NOR WAS PETITIONER NOTIFIED UNTIL THE TRIAL WAS IN PROGRESS. A REQUESTED CONTINUANCE WAS DENIED.

A point which we deem of vast importance to which practically no time was devoted during the oral argument because of lack of time, was the question of the use of evidence in the trial in the State of California, which was produced by the State of California from the State of Colorado. The use of this evidence and the manner in which it was produced deprived the petitioner of *notice* and an *opportunity* to be heard, both of which rights are fundamental essentials of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;
Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780;
Pennoyer v. Neff, 95 U. S. 714;
Baldwin v. Hale, 1 Wall. 223, 230.

The Indictment Contained No Names of Colorado Witnesses.

The defendant was charged with the murder of Mary Emma James in Los Angeles County, California. The in-

dictment returned in the case on August 5th, 1935, gave the names of seven witnesses who were brought before the Grand Jury (R. 816). None of these persons were from the State of Colorado, and no notice was received by the accused even to the extent of furnishing the names of any witnesses until after the trial had commenced and was in progress that anyone would be produced from the State of Colorado to testify to an alleged occurrence four years before the date of trial with respect to the death of a former wife of the petitioner.

So fundamental is this right to receive notice of the names of the witnesses in a capital case in advance of trial, that the United States has passed Section 1033 of the Revised Statutes, 18 U. S. C. A., Sec. 562, which provides that when any person is indicted for any capital offense a copy of the indictment and a list of the jurors and witnesses who are to be produced in the trial upon the indictment shall be delivered to the defendant at least two entire days before the trial.

This section of the statute is *mandatory* on the Government. In the case of *Logan* v. *U. S.*, 144 U. S. 263, 304, 36 L. Ed. 429, the Court, interpreting provisions of this section said:

> "The provision is not directory only, but mandatory to the government; and its purpose is *to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense.*" (Italics added.)

But in the case at bar, not even the names of witnesses from Colorado were furnished the accused by indictment, or by any other means whatsoever, until they took the witness stand in California in the middle of the trial and testified at length to matters alleged to have occurred in Colorado four years prior to the date of trial and in relation to a former wife, Winona James, and not to Mary Emma

James, named as the victim in the indictment against the petitioner.

One witness testified to matters in Colorado which appeared untrue. Petitioner received a letter from a man in Colorado giving this information. The defense requested a continuance of the trial for the purpose of getting this testimony. The request was denied (R. 684-690).

Under such circumstances how could one adequately defend against this evidence or meet it?

California Has No. Provision for a Bill of Particulars.

California's criminal procedure provides for no means of getting a bill of particulars, and no statute requires the prosecutor to give the names of the witnesses whom he intends to call to the defense as is provided by common law and by Federal statutes.

The first notice which the petitioner received was after the trial commenced, and counsel for the accused were in the middle of the trial.

No California Process Available.

No process of the State of California was available to enable him to bring witnesses from Colorado into court. No means were available for him to leave the trial for the purpose of investigating such evidence from the State of Colorado.

If notice and an opportunity to defend means anything in a criminal trial, surely in this case the petitioner was deprived of every notice and every opportunity to defend against this Colorado evidence, which was extremely prejudicial to him. In fact, one-fourth of the trial was devoted to the Colorado evidence and much of the argument to the jury consisted of argument of the Colorado evidence.

In *Smith* v. *O'Grady*, 85 L. Ed. 550, this Court said:

> "The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

In the case of *U. S.* v. *Ashe*, 2 F. (2d) 735, two indictments charging murder were found against a man named Zalotta, and consolidated into a single trial. In that case the court held as unfair a consolidation of two murder indictments into a single trial before a single jury. The court there said:

> "With all these evidences of the state's solicitude for the protection of the accused, can it be possible that in the trial itself in which are the issues of life and death, the officers of the state can deprive the prisoner of the essential right to a separate trial on the issue solemnly raised on each indictment? *Can they be permitted to mingle and confuse the cases, by making hotchpot of the indictments and issues before a single jury, and jeopardize the life of the prisoner by holding him out as a habitual criminal, denying him his full legal right of challenges, confound the prisoner in his defense, and distract the minds of the jury?* Such an invasion of the established course of trial in high felonies rises far above mere irregularity of procedure. The time honored right of a prisoner to a separate trial on each indictment involving his life, which has been recognized for centuries, upheld by the courts as a continuous expression of the consciouness of the people, unchanged in the progress and development of the law, is basic, fundamental, and absolute, and involved in the very conception of free government.
>
> "If we stop to inquire, Did harm result to the prisoner from such a procedure? the answer is to be found in the verdict." (Italics ours.)

No Notice or Opportunity to Defend.

In the case at bar there were not two separate indictments, but nevertheless, on a single indictment the People

of the State of California sought to try the issues in the Colorado matter before a California jury in which no indictment had ever been returned, and in which no notice or opportunity was given to the accused to prepare to meet the charges thus presented without indictment or without any proceedings upon which the accused could properly prepare a defense to the same.

If it was a violation of due process of law to consolidate the two indictments in the case of *United States* v. *Ashe*, 2 F. (2d) 735, and present them before a single jury and to deprive the accused of a fair and impartial trial, how much more serious is it where the accused, as in this case, had no other indictment, had none of the benefits of a proper accusation, or some sort of notice and opportunity to defend against it. As said in the *Ashe* case—"can they (the people) be permitted to mingle and confuse the cases, by making hotchpot of the indictment and issues before a single jury, and jeopardize the life of the prisoner by holding him out as a habitual criminal * * * confound the prisoner in his defense and distract the minds of the jury?"

Jury Distracted From Real Issue. Petitioner Confounded in His Defense Before California Jury in Colorado Evidence.

Surely, in the presentation of this great mass of *Colorado* evidence the petitioner in this case was jeopardized before this jury, the defendant was confounded in his defense, and the minds of the jury were distracted from the issue of whether the defendant was guilty or innocent of the crime in California to a collateral issue uncharged, unnoticed, and more than a thousand miles away, and for which no defense could be prepared.

So, if the trial before a single jury on two indictments is void for want of due process of law guaranteed by the Constitution of the United States, so here, the judgment

was necessarily void for trying this petitioner on both the California and Colorado issues before the same jury, confounding the prisoner in his defense and distracting the jury on the sole issue before it.

The production of the Colorado evidence was strongly objected to (R. 257, 261). During the production of this Colorado evidence the defense sought and asked for a continuance to meet at least one phase of the evidence, which apparently was testified to falsely (R. 684-688). Mr. Chief Justice Hughes on oral argument asked questions on this point of one of counsel for the respondent, but the questions were unanswered. When this counsel said he would let the other counsel reply. The other counsel did not reply to these questions. This continuance was denied (R. 688).

Surely if an accused, without notice, without an opportunity to prepare a defense, asks for a continuance (R. 688, 689) to meet evidence which has been presented against him, the denial of that right is the denial of due process of law guaranteed by the 14th Amendment.

California Procedure Does Not Permit Depositions in Homicide Cases.

Another feature of the laws of the State of California is that no provision is made under the laws for the taking of depositions and use of the same in homicide cases. Article I, Section 13 of the California Constitution provides for the taking of depositions in any cases except those of homicide.

Article I, Section 13 provides as follows:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right to * * * have the process of the court to compel the attendance of witnesses in his behalf and to appear and defend in person and with counsel. * * * The legislature

> shall have power to provide for the taking in the presence of the party accused and his counsel, of depositions of witnesses, in criminal cases *other than cases of homicide*, when there is reason to believe that the witnesses, from inability or other cause, will not attend at the trial." (Italics added.)

When considered in the light of the common law requiring the trial of an accused to take place in the vicinage where the alleged crime was committed (*People* v. *Powell*, 87 Cal. 348) it is clear that the Constitution of California intended that in homicide cases all the witnesses must be brought in in person and that the trial must be in the vicinage where the alleged offense took place; otherwise the taking of depositions would not be excluded.

In view of the express provisions of the California Constitution excluding the taking or use of depositions in cases of homicide, the Constitution of California blocks the defense from producing a defense by deposition, and surely there are no processes by which the witnesses could be brought from the State of Colorado to California in response to any of the witnesses which the people brought, nor would there be any opportunity at all, legally, to defend against anything which the people of the State of California produced through the means of vast wealth and resources which the State possesses, and which were not open to the defense, outside of a territory of 100 miles within the area of the vicinage of the alleged offense.

Due to the shortness of time in the original argument none of these matters was presented to this Honorable Court, and they were not touched upon as to this phase in the original briefs on file.

IV.

California's Principal Witness Was One Charles H. Hope, Who Since the Trial Stated He Was Promised

IMMUNITY TO TESTIFY FALSELY AND THAT HE DID TESTIFY FALSELY IN THE TRIAL AT THE REQUEST OF THE PROSECUTION WHO KNEW HIS TESTIMONY WAS "ALL THE BUNK." THE USE OF TESTIMONY KNOWN TO BE PERJURED VIOLATES DUE PROCESS OF LAW GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

During oral argument no opportunity was afforded to discuss the repudiation by Charles H. Hope of the testimony that he gave in the case, which testimony he stated was entirely perjured, was obtained by deceit, fraud, collusion and coercion, and that he was impelled by force and fear, threats and promises; that all these facts, including the falsity of his statements, were known to the prosecution at the time of the trial and even participated in by them, particularly by the district attorney himself.

These startling assertions are uncontradicted. Their truth is thus conceded.

This Court has had occasion to state in *Mooney* v. *Holohan*, 294 U. S. 102, 79 L. Ed. 794, that the use of perjured testimony in the trial of a criminal case is violative of due process of law guaranteed by the 14th Amendment to the Constitution of the United States. This doctrine is again approved in *Jones* v. *Comm.*, 97 Fed. (2d) 335, 339.

In *Chambers* v. *Florida*, 309 U. S. 227 it appeared that three other co-defendants in addition to Chambers—Jack Williamson, Charlie Davis and Walter Woodward—had confessed and their statements were being used against Chambers; that the confessors had been threatened and questioned, and that they did not have the opportunity to employ counsel. This Court reversed the judgments in that case for want of due process.

In the present case the witness Hope (like the witnesses Williamson, Davis and Woodward in the Chambers case),

repudiated his confession and plea and he filed affidavits in which he stated as follows:

> "Affiant avers that from the very inception of said proceedings, from the time of his arrest on continuously throughout the trial and until very recently, he has been and was subjected by the investigators and deputies of the district attorney's office of Los Angeles County, acting for said Plaintiff State, as officials of such, to a constant pressure of fear and threats, and that he was induced by said fear and threats and by false promises to make the statements and to give the testimony against himself and co-defendant which he did give; that from the very moment of his arrest, your affiant protested his innocence and stated that he was not conscious of having committed any crime or having done anything wrong, but that for nearly eighteen days after his arrest and before any attorney was secured or allowed to consult with him, he was held in the private custody of the officers and investigators of the said plaintiff, incommunicado, that he requested an attorney and was refused the right to an attorney and was not allowed to see one; that during that time he was subjected to a constant grilling and drilling in the story which said deputies of the State wanted him to tell; that all of said testimony so given on the trial was by them carefully rehearsed by them to him and he was induced by threats and false promises so to testify.
>
> "Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:
>
> "'If You Don't Co-operate with Us, Tell the Truth as It Is, I Will Frame You if I Have to.'
>
> "That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent,

your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

"That at said time and place, said district attorney further threatened your affiant, 'I'll try you with him and I'll hang you with him if you don't do as you're told.' The above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could 'co-operate.' That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, 'You would rather have this case at this time before election than anything on earth. Stop threatening the man and listen to him.'

"Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fear, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of 'Guilty', it would be a mere matter of form, and that after the James trial was out of the way, they would then extend him leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of such minor misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that whatever he

did he did in good faith and without criminal intent and without knowledge of wrongdoing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect. That upon the conclusion of James trial, your affiant was given no opportunity to defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void * * * (R. 923).

"I was held incommunicado in Glendale, brought from there to Grand Jury Room (had never seen a lawyer) and told by Jack Southard that I would be told in the 'room' that I had rights but that I had better disregard that and tell the story that they had given me and that had been gone over by them with me hundreds of times (R. 926).

"Affiant further avers:

"During James trial as I was preparing to take the stand, Southard told me it was absolutely necessary to say I saw the snake bite the woman, I refused. He said I would at least have to say the snake struck at the woman. He explaining that I should say this not that I did not know. He further stated to me, 'You'd better! You're not out of this yourself yet' (R. 927).

"The further part of the District Attorney in not allowing my day in court and setting degree after my

plea without defense promised and until after I had testified and holding a death threat over me if I did not" (R. 927).

In another affidavit Hope averred (R. 932):

"Affiant avers that said state prosecuting officials practiced collusion on the court and jury in attempts to give credence to the State's theories and case (quoting from dissenting opinion, 339 to 469) 'if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense', and practiced collusion also by the false representations upon the trial to the court and jury that affiant's testimony was free and voluntary and not exacted by promises of immunity but 'having been moved solely by the promptings of conscience, and not at all induced by promises or understandings', as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a part of said practice of deceit, deception and collusion, one of said court officials, as a part of such prearrangement and design to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder.' That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not wholly above-board but induced by promises and as the result of collusion and a collusive understanding and connivance between the state prosecuting officials and affiant."

Again he averred: (R. 934)

"I aver that said plea of guilty, said testimony on the trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by

the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: "That stuff about snakes is the bunk: the snake never bit the woman and you **know it.** That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

"I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and imprisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immuity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said to me, 'We will keep our word: You keep quiet.'; affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case;

"As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: **Now you be damn sure that you swear that the snake struck at the woman and bit her foot, also, Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot—you are not out of this yourself,** and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimida-

tion and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his staff that it was not true in so far as him being an eye-witness. (R. 935)

"Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he give false testimony and testimony as above mentioned which he told them was not true, which affiant knew to be untrue, and which they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case * * *."

Hope's affidavits were uncontradicted. They aver that his testimony was perjured, that it was known to be perjured, and that it was manufactured and framed by the prosecution; that in return for giving it he was promised the utmost leniency. The record shows that he did receive leniency.

In their reply, the respondent said that the Supreme Court of California, had a right to summarily deny the writ after examining the affidavits.

Such procedure was followed in the Federal courts of the Ninth Circuit (California), but since the hearing on this cause, this Honorable Court in *Walker* v. *Johnson*, 85 L. Ed. 517, through Mr. Justice Roberts, reversed the procedure and held that "if he was deceived or coerced by the prosecutor into entering a guilty plea" he was denied a constitutional right. We contend that the use of testimony of a codefendant based upon coercion or deception and averred to be perjured violated petitioner's rights under *Mooney* v. *Holohan*, 294 U. S. 103.

In *Jones* v. *Commonwealth*, 97 F. (2d) 335, 338, it is said:

"The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in Mooney *v.* Holohan, 294 U. S.

103, 112, 55 S. Ct. 340, 341, 342, 79 L. Ed. 791, 98 A. L. R. 406. Its requirement in safe-guarding the liberty of the citizen against deprivation through the action of the state embodies those fundamental conceptions of justice which lie at the base of our civil and political institutions, referred to in Hebert *v.* Louisiana, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102. This requirement cannot be satisfied By mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney Case embraces no more than the facts of that case require, and that the fundamental conceptions of justice which lie at the base of our civil and political institutions must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

These affidavits were uncontradicted.

As grounds for rehearing it is extremely important that we argue these matters, unargued in the hearing on February 6, 1941.

Furthermore, since the oral argument in this case this Court has handed down a decision in the case of *Walker* v.

Johnson, 85 L. Ed. 517, in which the Court upheld the right of a petitioner to be heard upon an accusation of a denial of constitutional rights, that is to say, that he was denied the right of counsel at the time he entered his plea of guilty.

In that proceeding the government denied that the petitioner was deprived of his constitutional rights and traversed the matters set forth by him showing his alleged denial. The Court below treated the matter in a summary fashion and denied the petitioner a hearing. This Honorable Court stated that this served but to raise a material issue of fact, and stated:

> "If he was deceived or coerced by the prosecutor into entering a guilty plea he was deprived of his constitutional right and should be heard" (85 L. Ed. 521).

Hope's Affidavits That He Committed Perjury Undenied.

In the case at bar there was no denial of the affidavits of Hope and thus no issue was raised, and where, as here, no issue is raised, the denial of the constitutional right of petitioner herein by reason of the matters set forth in Hope's affidavits, entitles him to a reversal of the judgment, and we desire to be heard further in connection therewith.

Mooney v. *Holohan*, 294 U. S. 102.

A judgment based on perjured testimony is void.

Mooney v. *Holohan*, *supra*.

Any judgment resulting from unconstitutional procedure is void.

Johnson v. *Zerbst*, 82 L. Ed. 1461;

Re Nielsen, 131 U. S. 176, 33 L. Ed. 118;

Moore v. *Dempsey*, 261 U. S. 86, 92, 67 L. Ed. 543.

V.

THE PETITIONER WAS DENIED THE RIGHT OF COUNSEL, AND THEREFORE DUE PROCESS OF LAW GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioner, from the very outset, stood in great peril of his life. The State planned to take it and hurled serious accusations against him. He was therefore entitled to the benefit of counsel from the very moment of his arrest.

Powell v. *Alabama*, 287 U. S. 45.

It is not denied that he was taken by the district attorney to a house next door and held incommunicado.

It is not denied that he was not booked in the jail of Los Angeles County, as required by law.

It is not denied that Los Angeles County had a magistrate available for arraignment of James, including night courts, and that upon his arraignment it would be the duty of the magistrate to send for any counsel in the county which petitioner might name. (Article I, Section 8, Constitution of California.)

But it was not the thought of the district attorney that this petitioner should be allowed the right and benefit of counsel. Nor was there any showing by the people, upon whom the burden rested, that petitioner had that opportunity for some days thereafter.

When the assistant chief deputy district attorney handling the investigation went to the county jail on May 2nd, 1936, he then knew that petitioner had seen counsel, but in the face of that knowledge he proceeded without notifying defense counsel with methods which are proscribed by the 14th Amendment to the Constitution of the United States, to hurl grave and serious accusations against the petitioner, and to use petitioner's silence in the absence of said counsel as an implied admission of guilt.

Later the chief deputy district attorney went to the Superior Court and secured a court order for the removal of the petitioner from the jail without advising or notifying counsel for the petitioner and without prisoner's consent. Petitioner was taken to the scene of his wife's death, without the knowledge, advice or benefit of counsel. Later he was brought back to the district attorney's office where he requested that his counsel be sent for, and that counsel not being immediately available because he was two and one-half hours distant from Los Angeles, he requested that another attorney be sent for. Both of these requests were denied.

In *Ex parte Chin Loy You*, 223 Fed. 833, at 838, the Court said:

> "Why were the ordinary safeguards against injustice refused or ignored? Why was no notice given to the petitioner's counsel that the testimony of the Pennsylvania witness was to be taken? Why was Hop Lee not examined in the proceedings against this petitioner, and offered for cross-examination? Why was the petitioner denied the right of counsel before the first hearing, and at any 'hearing,' until the government's case against him had been completed? These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did."
>
> "It is true that the right to counsel secured by the Constitution (Amendment 6, Sec. 1) relates only to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See, too, Amendment 14."

In *Powell* v. *Alabama*, 287 U. S. 45, this Court, in a lengthy review in that capital case, held that the denial of the right of counsel was a denial of due process of law. In the case

at bar the burden was upon the People of the State of California to show that the petitioner had the full benefit of counsel. Such showing was not made by the record. On the contrary, the showing is that the defendant was deprived of counsel and was refused counsel when he asked for it. Under such circumstances his most sacred right was violated.

Due process of law also, under the Constitution and laws of the State of California and Section 849 of the Penal Code, required that the defendant be taken immediately before the nearest and most accessible magistrate in the county. There he was entitled to be arraigned according to the Constitution of the State of California and advised of his right to have counsel immediately. It was to circumvent this express provision of the laws of California that he was detained in a private house, and no counsel was called for him.

As said in *Powell* v. *Alabama*, 287 U. S. 45, 84 A. L. R. 540, 541:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law * * *. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect * * *.
>
> "The state decisions which refer to the matter, invariably recognize the right to the aid of counsel as fundamental in character. E. g., People *v.* Napthaly, 105 Cal. 641, 644, 39 Pac. 29; Cutts *v.* State, 54 Fla. 21,

23, 45 So. 491; Martin *v.* State, 51 Ga. 567, 568, 1 Am. Crim. Rep. 536; Sheppard *v.* State, 165 Ga. 460, 141 S. E. 196; State *v.* Moore, 61 Kan. 732, 734, 60 Pac. 748; State *v.* Ferris, 16 La. Ann. 424; State *v.* Simpson, 38 La. Ann. 23, 24; State *v.* Briggs, 58 W. Va. 291, 292, 52 S. E. 218."

We respectfully request the further opportunity to be heard to present these matters more fully.

VI.

Each of the Actions of the State, Violative of the Fundamental Rights of the Petitioner, Denied to Him the Equal Protection of the Laws Guaranteed by the 14th Amendment to the Constitution of the United States.

Where a State officer violates fundamental rights guaranteed by the 14th Amendment—where they treat a person differently than all other persons generally situated in the same position, then the equal protection clause of the 14th Amendment is violated.

Thus, though a person under arrest is entitled to be free from, and ordinarily is not subjected to third degree brutal methods; is not taken to a private house by the district attorney or his investigators and held incommunicado there but is regularly lodged in jail; is ordinarily given the right and privilege of being arraigned before a magistrate immediately; advised of his right to have counsel, and send for counsel as guaranteed by Article I, Sec. 8 Constitution of California, and advised of and given his other fundamental rights—where State officers deny to a person these fundamental rights, they deny to him the equal protection of the laws.

Although ordinarily trials are conducted upon the basis of an appeal to reason and not to passion and prejudice, where one is treated differently and an appeal is made to

inflame the minds of the jurors so that the accused cannot have a fair and impartial trial, he is denied the equal protection of the laws.

Where, ordinarily, a person is tried on evidence producible within the vicinage of the alleged offense and has notice and an opportunity to defend himself against the charges, if one is deprived of those rights and is put in a different category, he is denied the equal protection of the laws.

Thus, when the indictment in this case did not give to the accused any names of any witnesses from the State of Colorado, and no notice was given to him until after the trial had commenced that he might have to defend against matters alleged to have occurred more than a thousand miles away, with no opportunity to defend against them, he was treated differently than other persons in the same or similar situations.

Where, under the Constitution and laws of the United States (*Mooney* v. *Holohan*, 294 U. S. 103; *Jones* v. *Commonwealth*, 97 F. (2d) 335, 338) a record shows that an accused person is entitled to have the judgment set aside for a conviction rendered upon perjured testimony, the denial of that right to the petitioner under similar circumstances denies to him the equal protection of the laws.

Where, ordinarily, a person has the right to and is accorded the benefit of counsel from the very inception of arrest and arraignment until the close of his proceeding—a denial to an accused of those rights is a denial of equal protection under the laws.

In the Civil Rights cases, 27 L. Ed. 836, 839, the Court said that the 14th Amendment is prohibitory in character, "it nullifies and makes void * * * state action of every kind, which impairs the privileges and immunities of the citizens of the United States, or which injures them in life, liberty or property without due process of law, or which *denies to any of them the equal protection of the laws.*" (Italics added.)

This section authorizes Congress to provide modes of redress against the operation of State laws, and "the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against State laws and *State proceedings affecting the rights and privileges.*" See also, *Yick Wo* v. *Hopkins*, 118 U. S. 374; *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462; *Truax* v. *Corrigan*, 257 U. S. 312.

Wherefore, petitioner prays that this cause may be reheard and reversed.

The cases of *Chambers* v. *Florida*, 309 U. S. 227; *White* v. *Texas*, 310 U. S. 530; *Canty* v. *Alabama*, 309 U. S. 629, and *Brown* v. *Mississippi*, 297 U. S. 278, each contain but a single violation of due process of law, namely, third degree methods used to extort a confession from the petitioners, which were used in evidence against them. An examination of the records in each of those cases shows that none of the cases is as flagrant as this one. The constant questioning and cross-questioning of the petitioner in this case, the admitted battery committed upon him by a police officer having him in custody, the admitted taking him into a private house by the district attorney without any authority of law, the deprivation of sleep, food and rest, the constant threats and menaces, accusations, questioning and cross-questioning, similar to that conducted in *Bram* v. *United States*, 168 U. S. 557, 42 L. Ed. 568, surely does not present a picture of a free and voluntary statement admitted by a court of justice in a trial conducted in accordance with a constitution dedicated to the full and equal protection of all citizens according to the law of the land.

This case presents four other highly important violations of rights on the part of the State of California against the accused:

The production of live and dead snakes in the court-room for the sole purpose of inflaming the passions and prejudices of the jury;

The production in evidence from the State of Colorado of matters against which the defendant had no notice or opportunity to defend, regarding the death of a former wife in that State, four years before;

The deprivation of the right of counsel was a denial of fundamental rights guaranteed by the 14th Amendment to the Constitution of the United States (*Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158);

The denial to this petitioner by California of the relief provided by law, namely nullifying the judgment, when it appears that the only witness in the case who testified to facts which in any way involved the charges against the accused has, subsequent to conviction, repudiated his testimony and sworn that the same was false and known by the prosecutor to be false when it was produced in the trial, coupled with the further fact that such sworn repudiations were uncontradicted and, therefore the repudiations are admitted to be and are true.

In no case of which this petitioner's counsel is aware has there ever been a death sentence upheld by this high Court, by an equally divided opinion of the Court, and thus by operation of law.

Petitioner most respectfully prays, therefore, that a rehearing be granted so that a decision may be rendered and that the case may be reversed for the violations of fundamental constitutional rights guaranteed to this petitioner and to all persons in the United States of America by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 134

MAJOR RAYMOND LISENBA,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

PETITION FOR REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Comes now the petitioner and most respectfully petitions this Honorable Court for rehearing of the cause on habeas corpus, and adopts and incorporates in this petition for rehearing all the points and matters raised in the petition for rehearing of the judgment in cause No. 133, as though herein fully set forth.

Petitioner particularly directs the attention of this Honorable Court, however, to the fact that one point is raised in this petition for rehearing, to-wit, the question of perjury, which we desire to call to this Court's attention as requiring further consideration and determination by this Court.

Since the trial of this case the State's principal witness, Charles H. Hope, has filed two affidavits in this case stating that all his testimony was perjured (R. 920, 922, *et seq.*). He says in part:

"Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:

"If You Don't Co-operate with Us, Tell the Truth as It Is, I Will Frame You if I Have to."

That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent, your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

"That at said time and place, said district attorney further threatened your affiant, 'I'll try you with him and I'll hang you with him if you don't do as you're told.' The above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could 'co-operate.' That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, **'You would rather have this case at this time before election than anything on earth. Stop threatening the man and listen to him.'**

"Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fears, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of 'Guilty', it would be a mere matter of form, and that after the James trial was out of the way, they would then extend his leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of such minor misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that whatever he did he did in good faith and without criminal intent and without knowledge of wrong doing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect That upon the conclusion of James' trial, your affiant was given no opportunity to defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of

murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void * * *" (R. 923).

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ises or understandings', as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a part of said practice of deceit, deception and collusion, one of said court officials, as a part of such prearrangement and design to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder.' That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not wholly above-board but induced by promises and as the result of collusion and collusive understanding and connivance between the State prosecuting officials and affiant.

Again he averred (R. 934):

"I aver that said plea of guilty, said testimony on the trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: 'That stuff about snakes is the bunk: the snake never bit the woman and you know it.' That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

"I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and imprisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immunity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said to me, 'We will keep our word: You keep quiet'; affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case;

"As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: 'Now you be damn sure that you swear that the snake struck at the woman and bit her foot', also, 'Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot,—you are not out of this yourself", and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimidation and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his staff that it was not true in so far as him being an eye-witness (R. 935).

"Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he gave false testimony and testimony as abovementioned which he told them was not true, which affiant knew to be untrue, and which

they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case. * * *"

Hope's affidavits were uncontradicted. They aver that his testimony was perjured, that it was known to be perjured, and that it was manufactured and framed by the prosecution; that in return for giving it he was promised the utmost leniency. The record shows that he did receive lenience.

In their reply, the respondent said that the Supreme Court of California had a right to summarily deny the writ after examining the affidavits.

Such procedure was followed in the Federal courts of the Ninth Circuit (California), but since the hearing on this cause, this Honorable Court in *Walker* v. *Johnson*, 85 L. Ed. 517, through Mr. Justice Roberts, reversed the procedure and held that "if he was deceived or coerced by the prosecutor into entering a guilty plea" he was denied a constitutional right. We contend that the use of testimony of a co-defendant based upon coercion or deception and averred to be perjured violated petitioner's right under *Mooney* v. *Holohan*, 294 U. S. 103.

In *Jones* v. *Commonwealth*, 97 F. (2d) 335, 338, it is said:

> "The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in Mooney *v.* Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 341, 342, 79 L. Ed. 791, 98 A. L. R. 406. Its requirement in safe-guarding the liberty of the citizen against deprivation through the action of the state embodies those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' referred to in Hebert *v. Louisiana*, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102. This requirement cannot be satisfied 'By mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and

imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney Case embraces no more than the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

In *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716, three co-defendants of Chambers were similarly compelled to make false statements, enter pleas of guilty and testify against Chambers. This Honorable Court on proceedings on *coram nobis* voided the judgments.

The uncontradicted facts herein require a reversal. *Mooney* v. *Holohan*, 294 U. S. 103; *Smith* v. *O'Grady*, 85 L. Ed. 548.

The argument made orally by respondent that this appellant is no negro and therefore that the 14th Amendment does not apply to him as to the crop farming negroes in the south is untenable. This seems to be a popular misconception among prosecutors that this case should dispel.

We respectfully pray for a rehearing on all the grounds heretofore raised in the petition and for reversal of the judgment, and order denying petitioner a writ of *habeas corpus*.

Respectfully submitted,

MORRIS LAVINE,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

Nos. 4 and 5.—October Term, 1941.

Major Raymond Lisenba, Petitioner,
vs.
The People of the State of California.

On Writs of Certiorari to the Supreme Court of the State of California.

[December 8, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was convicted of murder and sentenced to death in the Superior Court of California for Los Angeles County. The Supreme Court of California affirmed the judgment March 21, 1939, two judges dissenting.[1] A rehearing was granted, the case was reargued and, October 5, 1939, the decision was reaffirmed and the former opinion adopted and amplified, two justices dissenting.[2] No question arising under the Constitution of the United States had been raised or decided. In a second petition for rehearing the petitioner, for the first time, asserted that his conviction violated the Fourteenth Amendment. November 3, 1939, the Court ruled: "The petition for a rehearing herein is denied."

The Chief Justice of the State allowed an appeal November 6, 1939, and November 8, 1939, executed a certificate in which he enumerated the constitutional questions presented by the second petition for rehearing; stated that the court entertained the petition, and explicitly overruled each of the contentions made therein; certified that the decision denying rehearing "is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States . . . were violated"; and concluded: "It ordered that this certificate be filed in this court and made part of the record on appeal to the Supreme Court of the United States." On the record so made this Court has jurisdiction to review the judgment.[3]

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[1] 89 P. 2d 39.

[2] 14 Cal. 2d 403, 94 P. 2d 569.

[3] Roby v. Colehour, 146 U. S. 153; Gulf and Ship Island R. R. Co. v. Hewes, 183 U. S. 66; Whitney v. California, 274 U. S. 357; Honeyman v. Hanan, 300 U. S. 14.

The appellant did not draw in question the constitutional validity of any statute of California. We, therefore, dismissed the appeal[4] but, treating the papers as a petition for certiorari,[5] we granted the writ. This case is No. 4.

October 31, 1939, the petitioner prayed the Supreme Court of California for a writ of *habeas corpus* on the theory that his trial and conviction had deprived him of his life without due process. He submitted affidavits of one Hope, who had turned state's evidence against him. In these Hope asserted that his testimony was false, had been coerced by threats and induced by promises of leniency and by fraud.

November 9, 1939, *habeas corpus* was denied, without prejudice. The Chief Justice of California allowed an appeal and made and ordered filed of record, a certificate respecting the constitutional questions presented and decided by the court, similar to that entered in No. 4. We followed the same course as in No. 4 and the case is here as No. 5.

The appeals were presented *in forma pauperis*. The typewritten record is of great length. In the belief that only by briefs and oral argument, and on a record printed by the court, could proper consideration and decision be had of certain apparently important questions presented, we issued the writs. The cases were argued at the October 1940 term, and the judgments were affirmed by a divided Court. A petition for rehearing before a full Court was granted, the affirmances set aside, and the causes set for rehearing at this term.[6]

The petitioner, who used, and was commonly known by, the name of Robert S. James (and will be so called), and one Hope were indicted May 6, 1936, for the murder of James' wife on August 5, 1935. Hope pleaded guilty and was sentenced to life imprisonment. James pleaded not guilty, was tried, convicted, and sentenced to death. The trial was a long one in which the petitioner made objections to rulings and to the charge, which raise questions of state law decided by the opinion below, with which we have no concern. We shall refer only to so much of the evidence as bears upon the constitutional questions open here.

The State's theory is that the petitioner conceived the plan of marrying, insuring his wife's life by policies providing double

[4] Judicial Code § 237, as amended; 28 U. S. C. § 344(a).

[5] Judicial Code § 237, as amended; 28 U. S. C. § 344(c).

[6] 313 U. S. 537, 597.

indemnity for accidental death, killing her in a manner to give the appearance of accident, and collecting double indemnity.

James employed Mary E. Busch as a manicurist in his barber shop in March, 1935, and, about a month later, went through a marriage ceremony with her, which was not legal as he then had a living wife. While they were affianced, insurance was negotiated on her life, with James as beneficiary. Upon the annulment of the earlier marriage a lawful ceremony was performed. The petitioner made sure that the policies were not annulled by the fact that when they were issued Mary had not been his lawful wife.

The allegation is that James enlisted one Hope in a conspiracy to do away with Mary and collect and divide the insurance on her life. Hope testified that, at James' instigation, he procured rattlesnakes which were to bite and kill Mary; that they appeared not to be sufficiently venomous for the purpose but he ultimately purchased others and delivered them to James; that James, on August 4, 1935, blindfolded his wife's eyes, tied her to a table, had Hope bring one of the snakes into the room and caused the reptile to bite her foot; that, during the night James told Hope the bite did not have the desired effect and, in the early morning of August 5, he told Hope that the was going to drown his wife; that later he said to Hope, "That is that", and still later, at his request, Hope aided him in carrying the body to the yard, and James placed the body face down at the edge of a fish pond with the head and shoulders in the water.

James was at his barber shop on August 5. On that evening he took two friends home for dinner. When they arrived the house was dark and empty, and, upon a search of the grounds, his wife's body was found in the position indicated. An autopsy showed the lungs were almost filled with water. The left great toe showed a puncture and the left leg was greatly swollen and almost black. Nothing came of the investigation of the death.

James attempted to collect double indemnity; the insurers refused to pay; suits were instituted and one of them settled. As a result of this activity, a fresh investigation of Mary James' death was instituted. On April 19, 1936, officers arrested James for the crime of incest. He was booked on this charge on the morning of April 21, was given a hearing and remanded to jail. On May 2 and 3 he made statements respecting his wife's death to the prosecuting officials.

At the trial, in addition to that of Hope, testimony was adduced as to the finding and condition of the body, other evidence to connect James with the death, and expert testimony that the condition of the left leg could be attributed to rattlesnake bites. The purchase of snakes by Hope was proved by him and several other witnesses one of whom said he sold the two snakes to Hope, one of which Hope claimed had bitten Mary James. Two snakes were brought into court which the witness identified as those sold to Hope and by Hope resold to the witness.

James' statements were offered in evidence. Objection was made that they were not voluntary. Before they were admitted the trial judge heard testimony offered by the State and the defendant on that issue. He ruled that the confessions were admissible, and they were received in evidence.

The State offered evidence with respect to the death of a former wife of James in 1932. This tended to prove that, while driving down Pike's Peak, their automobile went off the road. James went for aid. When the persons called upon reached the automobile they found James' wife lying partly outside the car with her head badly crushed and a bloody hammer in the back of the car. James appeared unhurt. The woman recovered from her injuries but, shortly afterwards, was discovered by James and another man drowned in the bathtub in a house James had temporarily leased at Colorado Springs. James collected double indemnity from insurance companies for her death, the insurance having been placed at about the time he married her and her death having occurred within a few months thereafter. This evidence was admitted over objection and, at the close of the State's case, defendant's counsel moved for an adjournment so that they might take depositions of witnesses in Colorado. The court refused the application for want of a sufficient showing.

The petitioner's contentions, based upon the Fourteenth Amendment, are: that the conduct of the prosecuting officials and police officers denied him the equal protection of the laws; that his conviction deprived him of his life without due process, because the testimony of Hope, an accomplice, was not corroborated as required by the Penal Code of California and was, therefore, insufficient to sustain a conviction; because Hope's affidavits filed since the trial showed that his testimony was obtained by deceit, fraud, collusion, and coercion and was known to the prosecutor

to be false and hence the trial was a mere pretense; because the alleged occurrences in Colorado were wholly disconnected from the crime charged and petitioner was afforded no opportunity to answer the State's evidence respecting them; because the production of the rattlesnakes in the court was solely for the purpose of inflaming the jury; and because physical violence, threats, and other coercive means produced the confessions, and denial of requested opportunity to consult counsel preceded and accompanied their procurement.

First. The contention that illegal conduct on the part of the State's officers deprived petitioner of the equal protection of the laws hardly needs notice. The claim is that where officers violate the law so that some defendants are treated as was petitioner, and others are treated as the law requires, inequality and discrimination results which denies equal protection. The contention is frivolous. The record is bare of any proof to support it.

Second. The petitioner asserts that Hope's testimony was not corroborated. Under California law, the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction.[7] Petitioner contends that, in consideration of Hope's confessing and turning state's evidence, leniency was extended him by the court. Petitioner says that Hope's affidavits show that the prosecuting officials well knew that Hope's testimony was a fabrication; that he was persuaded so to testify by fraud, promises of leniency and threats, and the trial was a mere sham.[8]

These contentions need but brief notice. The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice. There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the state in turning state's evidence can be no denial of due process to a convicted confederate. Hope's affidavits not only were prepared after the State Supreme Court had passed upon the case and its opinion had been published but after the lapse of nearly three years from the trial. They could, therefore, be considered only in the *habeas corpus* case. The State contends that it had no opportunity to answer them. This is contested by the petitioner. In any event, it was stipulated that the

[7] Penal Code § 1111.

[8] Cf. Mooney v. Holohan, 294 U. S. 103.

record on appeal in the other case should be part of the record on the *habeas corpus* hearing; and comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. The appraisal of the conflicting evidence was for the court below. Even if its refusal to believe Hope's depositions were erroneous, the error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence.

Third. Testimony was admitted concerning the death of James' former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system.[9] The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law.

The insistence that the trial judge's refusal to grant a continuance, so that petitioner could take answering depositions, was a denial of due process goes even farther afield. Counsel had notice at the opening of the trial, or shortly thereafter, that the State intended to introduce evidence on this subject,—but waited until the State had rested before asking the continuance. Even then the showing was inadequate as to the identity of the witnesses and the nature of the expected evidence. The judge, in the exercise of his discretion, denied the motion. The Fourteenth Amendment gives this Court no mandate to review his action or inquire whether he abused his discretion in such a field.

Fourth. A part of the State's case was that Hope had purchased snakes and brought them to the petitioner in pursuance of the conspiracy. Two snakes were brought into the courtroom to be identified by the witness who said he sold them to Hope. The petitioner says that the sole purpose of the production of the snakes was to prejudice the jury against him and that those in the courtroom, including the jury, were in a panic as a result of the incident. For this he cites current newspaper accounts and affidavits of his counsel. The State denies any improper purpose and, to rebut the assertions of petitioner, relies on a counter-affidavit and a statement by the trial judge. The record discloses that at a subsequent stage of the trial the snakes were brought into court at the defendant's request.

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[9] See Wigmore, Evidence (3rd Ed.) Vol. II, § 363.

We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process.

Fifth. The important question is whether the use of the confessions rendered petitioner's conviction a deprivation of his life without due process of law. Recital of the relevant facts is essential to a decision.

The petitioner, while having almost no formal education, is a man of intelligence and business experience. After his arrest, on the charge of incest, on the morning of Sunday, April 19, 1936, he was taken for a short time to the adjoining house and shown a dictaphone there installed. He was brought to the District Attorney's offices where he was lodged in the Bureau of Investigation. He says that during the two or three hours he stayed there he was not questioned. He was taken into an office where the District Attorney showed him a statement made by a Miss Wright respecting the incest charge and asked him what he cared to say about it. He replied that he would not talk about it. He was questioned for about an hour. He says he was asked about his wife's death; others who were present deny this.

He was held in the District Attorney's suite until 5 or 6 o'clock, was given supper at a cafe, and then conducted to the house next door to his home, where he arrived about 7 or 7:30. Various officers questioned him there in relays throughout the night concerning his wife's death. He sat in a chair fully dressed and had no sleep. Monday morning he was taken out for breakfast and went with the officers to point out to them a house at 9th and Alvarado Streets, after which he was taken to the District Attorney's offices. He was brought back to the house next door to his home and the questioning was resumed, and continued until about 3 o'clock Tuesday morning when, he says, he fainted, and others present say he fell asleep and slept until 7 or 8 o'clock. After he had breakfasted he was booked at the jail, arraigned before a magistrate, and committed on the incest charge.

James testified that about 10 P. M. Monday, April 20, the officers began to beat him; that his body was made black and blue; that the

beating impaired his hearing, and caused a hernia; that later that night an Assistant District Attorney questioned him and that, after this ordeal, he collapsed. It is admitted that an officer slapped his face that night. This is said to have occurred as the result of an offensive remark James made concerning his wife; he denies having made the remark. In corroboration of James' testimony two witnesses said they noticed that one or both of his ears were bruised and swollen when he was lodged in the jail. All of this testimony is contradicted by numerous witnesses for the State, save only that it is admitted James was repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning. It is testified that, except for the one slap, no one laid a hand on James; that no inducement was held out to him; that no threats were made; that he answered questions freely and intelligently; and that he was at ease, cool, and collected. He admits that no promises or threats were made or maltreatment administered on the occasions when he was in the District Attorney's office. It is significant that James stated to one of the other officers that Officer Southard had slapped him and that when, May 2, the District Attorney asked how he had been treated he again referred to the slap. In neither case did he say anything of any other mistreatment. During the period April 19-21 James made no incriminating admission or confession.

James says that shortly after his arrest on Sunday morning he asked, and was refused, permission to get into touch with Mr. Silverman, who had been his attorney for a number of years. This is denied. There is evidence that he saw Mr. Silverman on Monday, April 20, at the District Attorney's office. Mr. Silverman testified that he saw the petitioner immediately after his formal arrest; that he was with the petitioner at the arraignment on Tuesday, April 21st; and again on April 25th in the jail. It is not suggested that James was not allowed to see his attorney as often as he desired or that any obstacle was interposed to the attorney's interviewing him between April 21 and May 2.

There is no claim that from April 21, when he was lodged in the jail, until May 2, he was interviewed, questioned, threatened, or mistreated by anyone. During this period his attorney told him that he would be indicted for his wife's murder and should not answer any questions unless his attorney was present.

May 1, Hope was arrested and made a statement. On the morning of May 2, James was brought from his cell to the chaplain's

room in the prison and confronted with Hope. An Assistant District Attorney outlined Hope's story and asked James whether he had anything to say, to which he replied: "Nothing".

He went back to his cell and, about noon, an order of court was obtained to remove him from the prison. He was taken to his former home by two deputy sheriffs. The evidence does not disclose clearly either the purpose or th incidents of this trip. He was then brought to the District Attorn- 's office and that official began to question him. He requested that his attorney be sent for. In his presence a telephone call was made which disclosed that Mr. Silverman was not in Los Angeles. He asked that another attorney be summoned. He states that the District Attorney said it would take too long to acquaint any other attorney with the facts; others say that James did not give the name of the other attorney he wanted and it took some time to discover whom he had in mind. The attorney was not summoned.

The District Attorney and, at times, others questioned James until supper time. Sandwiches and coffee were procured. James says he had coffee but someone took his sandwiches. There is testimony that he had them. The questioning, based on Hope's confession, was continued into the night without James having refused to answer questions or having made any incriminating answers.

There is a sharp conflict as to how the session terminated. James says that Officer Southard, who had struck him on April 20, occupied the room alone with him, all others having left; that the officer told him he had been lying all evening and that if he did not tell the truth the officer would take him back to the house and beat him; that this so frightened him that he agreed to do his best to recite to the District Attorney the same story Hope had told. There is much evidence that no such incident occurred. Deputy Sheriff Killion says that sometime before midnight the others had left petitioner alone with him and that petitioner turned to him and said something to the effect: "Why can't we go out and get something to eat; if we do I'll tell you the story." To this Killion replied that they could go out. Killion and another Deputy Sheriff, Gray, a lady friend, and another person accompanied petitioner to a public cafe where they had a supper and afterwards had cigars. James testified that neither Killion nor Gray nor the District Attorney ever laid hand on him, threatened him or offered him any inducement to confess.

The State's evidence is that after they started to smoke James told a story of which Killion took notes. Killion narrated at the trial what James had told him. The party returned to the District Attorney's office and there, responding to a question by the District Attorney, James said he had told Killion the story and, in answer to questions, he repeated that story. The interview was stenographically recorded. Most of the questions were asked by the District Attorney, some few by Killion and one or two other officers who were present. The group seems to have consisted of the District Attorney, an Assistant District Attorney, two officers, the two deputy sheriffs, and the stenographer.

Hope's statement laid on James the initiation of the murder plot, the attempt to consummate it with snake poison, the drowning and the disposition of her body. The account James gave Killion and the District Attorney, which he now says was an attempt to retell the tale Hope had told, which had been constantly dinned into his ears, is by no means a reiteration of Hope's story. On the contrary, James insisted that Hope suggested the destruction of Mary James, and the rattlesnake expedient, which Hope carried out; that when this failed Hope suggested that he, Hope, burn down the house to make it appear that Mrs. James died by accident, and that Hope also volunteered to commit an abortion on Mrs. James and also to do away with her. James asserted that, while he was absent from his home on the morning of August 5, 1935, Hope drowned his wife in the bathtub and told James that he had done so.

It is also to be noted that James' statement presents a lurid picture of the heavy drinking and intoxication of Hope, James, and Mary James during the three days anterior to the death of the latter. The effort evidently was to suggest that all were more or less irresponsible for their actions.

If Hope's story is true, James planned and accomplished the murder of his wife to obtain the insurance on her life. If James' statement is true, Hope planned the murder, James desired to abandon the scheme and thought that all Hope ultimately intended to do was to commit an abortion on James' wife and was shocked and surprised to learn that Hope had murdered her.

James said during supper at the cafe, and stated on another occasion, that there were not enough men in the District Attor-

ney's office to make him talk, and if Hope had not talked he would never have told the story.

Scrutiny of the two statements indicates that James carefully considered what Hope had said and made up his mind to tell a story consistent with his intimacy with Hope, and with various incidents James could not deny, and then depict a drunken orgy as a result of which his will power was so enfeebled that he could not resist Hope's determination to make away with Mrs. James.

At the trial James contradicted the essential particulars of Hope's testimony and most of his own confession, including the evidence respecting the snakes. He swore all Hope was to do was to attempt an abortion; he believed Hope did not accomplish this and his wife died as a result of falling into the pond in a fainting fit due to her pregnancy.

The evidence as to the treatment of James and the conduct of officials and officers from the moment of his arrest until the close of his statement to the District Attorney was heard preliminarily by the trial judge in order to determine whether the State had, as required by California law, carried its burden of proving the confessions voluntary. The ruling was that it had and the confessions were admitted. The trial judge, at defendant's request, charged the jury, in accordance with the State law, that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducements, promises, threats, violence, or any form of coercion.

The failure of the arresting officers promptly to produce the petitioner before an examining magistrate, their detention of him in their custody from Sunday morning to Tuesday morning, and any assault committed upon him, were violations of state statutes[10] and criminal offenses.[11]

We find no authority for the issue of the court order under which the sheriff's deputies took the accused from jail to his former home, and to the District Attorney's office for questioning.[12] The denial of opportunity to consult counsel, re-

[10] California Penal Code §§ 849, 4004.

[11] *Id.* §§ 145, 146, 149.

[12] The record does not disclose whether the application for the order was in the form of a petition; whether defendant was apprised of the motion for the order; whether he consented to its issue, or what representations were made to the court which granted the order. Section 4004 of the 1941 Code (§ 1600 of the 1935 Code) requires a prisoner committed by a magistrate to be confined in a jail until legally discharged, and declares that if he is permitted

quested on May 2nd, was a misdemeanor.[13] It may be assumed this treatment of the petitioner also deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.

But illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question we must decide. The effect of the officers' conduct must be appraised by other considerations in determining whether the use of the confessions was a denial of due process. Moreover, petitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness of the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue.

On the other hand, the fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false.[14] These vary in the several states.[15] This Court has formulated those which are to govern in trials in the federal courts.[16] The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in

to go at large out of the jail, except by virtue of a legal order or process, this shall constitute an escape. The only statutes we are able to find authorizing an order for the removal of a prisoner from jail are §§ 4011 and 4012 of the Penal Code, 1941, (§§ 1607 and 1608 of the 1935 Code) which provide for cases of individual illness or a general outbreak of pestilence or disease in a prison. Section 4011 permits a removal without court order in case of fire.

[13] Penal Code, § 825.

[14] Wigmore, Evidence (3rd Ed.) §§ 823, 824.

[15] *Id.* § 824.

[16] Sparf and Hansen v. United States, 156 U. S. 51, 55; Wilson v. United States, 162 U. S. 613, 622; Bram v. United States, 168 U. S. 532; Wan v. United States, 266 U. S. 1, 14.

a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession.

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession.

To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession which is used as evidence in the courtroom.[17]

A trial dominated by mob violence in the courtroom is not such as due process demands.[18] The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.

If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law.[19] The case can stand no better if, by the same devices, a confession is procured and used in the trial.

The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence. As we have said, "due process of law . . . commands that no such practice . . . shall send any accused to his death."[20]

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[17] Brown v. Mississippi, 297 U. S. 278.

[18] Moore v. Dempsey, 261 U. S. 86.

[19] Mooney v. Holohan, 294 U. S. 103.

[20] Chambers v. Florida, 309 U. S. 227, 241.

Where the claim is that the prisoner's statement has been procured by such means we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.[21] If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.[22]

There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.

Here judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not *eo nomine* one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty then is to determine whether the evidence requires that we set aside the finding of two courts and a jury and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.

In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats or implied promises of leniency. There remains the uncontradicted fact that on two

[21] Brown v. Mississippi, *supra*, 278; Chambers v. Florida, *supra*; Canty v. Alabama, 309 U. S. 629; White v. Texas, 310 U. S. 530; Vernon v. Alabama, 313 U. S. 547; Lomax v. Texas, 313 U. S. 544.

[22] Cases *supra*, Note 21.

occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20, and 21. If, without more, eleven days later confessions had been forthcoming we should have no hesitation in overruling his contention respecting the admission of his confessions.

Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.[23] There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign: that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded.

We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified: who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning.[24] This case is outside the scope of those decisions.

Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officers

[23] Wan v. United States, 266 U. S. 1, 14, and cases cited.

[24] See Chambers v. Florida; Canty v. Alabama; White v. Texas; Vernon v. Alabama; Lomax v. Texas, *supra*, Note 21.

of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavored fairly to set them forth, and in the light of the findings in the State courts, we cannot hold that the illegal conduct in which the law enforcement officers of California indulged by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains. The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; he admits that no threats, promises, or acts of physical violence were offered him during this questioning or for eleven days preceding it. Counsel had been afforded full opportunity to see him and had advised him. He exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.

The judgments are affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1941.

Major Raymond Lisenba, Petitioner, vs. The People of the State of California } On Writ of Certiorari to the Supreme Court of the State of California.

[December 8, 1941.]

Mr. Justice Black, dissenting, with whom Mr. Justice Douglas concurs.

I believe the confession used to convict James was the result of coercion and compulsion, and that the judgment should be reversed for that reason. The testimony of the officers to whom the confession was given is enough, standing alone, to convince me that it could not have been free and voluntary. Cf. *Bram* v. *United States*, 168 U. S. 532. In brief, those officers admitted the following:

Suspecting the defendant of murder they entered his home on Sunday, April 19, 1936, at 9 a. m. He was taken to a furnished house next door, in which the State's Attorney's office had installed a dictaphone. For the next forty-eight hours, or a little longer, the State's Attorney, his assistants, and investigators held James as their prisoner. He was so held not under indictment or warrant of arrest but by force. At about 4 a. m. Monday, one Southard, an investigator, "slapped" the defendant whose left ear was thereafter red and swollen. James was apparently kept at the State's Attorney's office during the daylight hours; the full extent to which he was questioned there is not clear. But on Monday and Tuesday nights, at the furnished house, with no one present but James and the officers, he was subjected to constant interrogation. The questioning officers divided themselves into squads, so that some could sleep while the others continued the questioning. The defendant got no sleep during the first forty-two hours after the officers seized him. And about 3:30 or 4 a. m. Tuesday morning, while sitting in the chair he occupied while being interrogated, at the very moment a question was being asked him, the defendant fell asleep. There he remained asleep until about 7 or 8 a. m. At about 11 a. m. the officers took him to jail

and booked him on a charge of incest. During the entire forty-two hours defendant was held, he repeatedly denied any complicity in or knowledge of the murder of his wife.

The second episode during which the officers held defendant incommunicado, and which produced the confession, was on May 2 and in the early hours of May 3. About 11 a. m. on May 2 an investigator for the District Attorney took James from his cell to the chaplain's room of the jail. In the presence of an Assistant District Attorney he was confronted by Hope and told that Hope had made a confession implicating James in his wife's murder. James refused to talk and was then carried back to his cell. A short time later, under a purported order of court, the nature or authority of which does not appear, James was taken from the jail to his home, and then somewhere between 1 and 4 p. m. to the District Attorney's office. The doors were locked. From then until about midnight the District Attorney, his Assistants, and investigators, subjected James to constant interrogation. Upon asking for his attorney, James was told he was out of the city. He then asked for another but whatever efforts the officers made to satisfy this request were unsuccessful. He was again confronted with Hope but neither this nor the questioning had elicited an admission of any nature by midnight. At that time, according to the investigators, James said to one of them, "Can't we go out and get something to eat—if you fellows will take me out to eat now, I will tell you the story."[1] He was taken out to eat by some of the officers, remained about an hour and a half, while at the restaurant made damaging admissions, and upon his return to the District Attorney's office, made the full statement which was used to bring about his conviction, completing it at about 3 a. m. Southard, the investigator who had previously "slapped" him, was one of the signed witnesses of the confession.[2]

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[1] This is rather close to a part of James' own testimony, to wit: "He continued to question me until later on in the evening. I was very sick. I was hungry; I was tired, and I told him a thousand times that I didn't know anything about Hope's story."

[2] James' testimony at this point was that Southard, left alone with him shortly before midnight, said James had been lying to the District Attorney long enough and threatened to take him back once again to the house next door to his home where James had been questioned April 19 to 21. In response to an inquiry whether he was told his confession might be used against him, James replied: "I didn't know whether the statement would be used against me, or not. I would rather die than to have gone back to that house and went through torture like the three days I was out there. I didn't care whether the statement was taken, or not."

I think the facts set out are sufficient to make applicable the principles announced in *Chambers* v. *Florida*, 308 U. S. 227, and the conclusion there announced that: "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." *White* v. *Texas*, 310 U. S. 530, 533; *Canty* v. *Alabama*, 309 U. S. 629; *Vernon* v. *Alabama*, 313 U. S. 547. Cf. *Bram* v. *United States*, *supra*.